U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0019 BLA
and 16-0020 BLA

VICTORIA MILLER (o/b/o and Widow of ROBERT J. MILLER)	)	
Claimant-Respondent	)	
v.	)	
GREENWICH COLLIERIES COMPANY	)	DATE ISSUED: 10/28/2016
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Health M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

James C. Munro, II (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05835) on a miner's claim filed on August 29, 2012,[1] and the Decision and Order Awarding Benefits (2014-BLA-05486) on a survivor's claim filed on December 17, 2013, of Administrative Law Judge Drew A. Swank, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] In consideration of the miner's claim, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that employer did not present any evidence to rebut the presumption that the miner's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(a), (b). Based on the filing date of the miner's claim, and his findings that the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits on the miner's claim. With regard to the survivor's claim, the administrative law judge found that claimant was automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

[1] The miner died on December 5, 2013. Survivor's Claim Director's Exhibit 3. Claimant, the miner's widow, is pursuing the miner's claim on his behalf. Hearing Transcript at 15.

[2] The Board consolidated both appeals for decision. *Miller v. Greenwich Collieries Co*., BRB Nos. 16-0019 BLA and 16-0020 BLA (Jan. 20, 2016) (Order) (unpub.).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis where the record establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[4] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

Employer argues that the administrative law judge erred in not considering the report of Dr. Swedarsky and that he did not properly consider the opinions of Drs. Fino and Pickerill relevant to rebuttal of the Section 411(c)(4) presumption.[5] Claimant responds, urging affirmance of the award of benefits on the miner's and the survivor's claims. The Director, Office of Workers' Compensation Programs, has declined to file a response brief with respect to either appeal.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal[8] nor clinical[9]

[5] Employer filed separate briefs raising the same points of error for each of the appeals.

[6] We affirm, as unchallenged on appeal, the administrative law judge's determinations that: the miner had seventeen years of qualifying coal mine employment; the x-ray evidence is sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §§718.202(a)(1); the miner had a totally disabling respiratory or pulmonary impairment; claimant is entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) in the miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Miner's Claim (MC) Decision and Order at 5, 11-13.

[7] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner's last coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989 (en banc); MC Decision and Order at 7; Director's Exhibit 4.

[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[9] Clinical pneumoconiosis is defined as:

pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). In considering whether employer was able to establish rebuttal under the first method, the administrative law judge found that because "the chest x-ray evidence establishes that [the miner] ha[d] simple, clinical pneumoconiosis" employer "cannot demonstrate that [he] d[id] not have clinical and legal pneumoconiosis under 20 C.F.R. §718.305(1)(d)(i)." Miner's Claim (MC) Decision and Order at 17.

With regard to the second method of rebuttal, the administrative law judge determined that the opinions of employer's physicians, Drs. Fino and Pickerill, failed to establish that no part of the miner's respiratory disability was caused by clinical pneumoconiosis. The administrative law judge explained:

> . . . Dr. Fino asserted that idiopathic pulmonary fibrosis, not coal workers' pneumoconiosis, caused [the miner's] totally disabling respiratory or pulmonary impairment. He stated that this disease is normally not related to coal mine dust exposure. He also opined, however, that "if there is clear-cut evidence of classical pneumoconiosis either radiographically or pathologically associated with the diffuse interstitial pulmonary fibrosis, then it is reasonable to assume that the two [diseases] are connected."
>
> In this claim the undersigned has found that the x-ray evidence establishes the presence of simple, clinical pneumoconiosis. . . . Thus, by Dr. Fino's logic, it is reasonable to assume that [the miner's]

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

> pneumoconiosis is connected with his idiopathic pulmonary fibrosis. . . . Thus, rather than ruling out a connection between pneumoconiosis and [the miner's] impairment, Dr. Fino's opinion actually establishes that pneumoconiosis contributed to his impairment.

MC Decision and Order at 20-21.

Similarly, the administrative law judge characterized Dr. Pickerill's opinion as excluding pneumoconiosis as a causative factor for the miner's impairment because the chest x-ray evidence did not establish that the miner [had] pneumoconiosis. MC Decision and Order at 21. Again referencing his finding of clinical pneumoconiosis, the administrative law judge concluded that "the very basis for Dr. Pickerill's opinion that pneumoconiosis did not contribute to [the miner's] respiratory impairment is not supported by the objective medical evidence." *Id*. Thus, the administrative law judge found that employer did not satisfy its burden to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii).

Employer contends that the administrative law judge erred in finding that it did not disprove that the miner had clinical pneumoconiosis arising out of coal mine employment or that his respiratory disability was not due to pneumoconiosis. After reviewing the administrative law judge's Decision and Order, the briefs of the parties, and the medical evidence of record, we must vacate the award of benefits. Specifically, we conclude that the administrative law judge did not follow applicable law, failed to weigh relevant evidence in the record, and did not conduct the rebuttal analysis required under the regulations and set out in *Minich*, 25 BLR at 1-154-56.

The administrative law judge determined that claimant established the existence of clinical pneumoconiosis based on his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge did not make any further findings pursuant to 20 C.F.R. §718.202(a)(2)-(4). This was error. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this cases arises, has specifically held that the administrative law judge must consider all of the evidence relevant to the existence of pneumoconiosis, including the biopsy or autopsy evidence, CT scans and medical opinion evidence, before determining that the disease is established.[10] *Penn*

[10] The administrative law judge's error at 20 C.F.R. §718.202(a) was compounded by the fact that he did not initially consider whether claimant was entitled to invocation of the Section 411(c)(4) presumption, consistent with the Board's guidance in *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). When, as in this case, the presumption is invoked, employer bears the burden of proof and must establish that claimant does not have either clinical or legal

Allegheny Coal Co. v. Williams, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 249 (4th Cir. 2016) ("Although the regulations group the forms of permissible evidence into discrete categories, an [administrative law judge] must weigh all of the evidence together when determining whether the miner has established the presence of pneumoconiosis.").[11]

Furthermore, employer is correct that the administrative law judge did not address the autopsy report and deposition testimony of Dr. Swedarsky, submitted by employer as affirmative medical evidence. Employer's Exhibit 7, 10. Because the administrative law judge did not address all the relevant evidence in accordance with *Williams*, we vacate his determination that employer failed to disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

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pneumoconiosis. *Id*. Thus, the administrative law judge should have addressed the issue of the existence of pneumoconiosis in the context of rebuttal with the burden on employer. *Id*.

[11] The administrative law judge indicated that he was not required to weigh all of the evidence, citing *Jones v. Badger Coal Co.*, 21 BLR 1-103, 106 (1998) (en banc). The administrative law judge misinterpreted *Jones* as being contrary to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997). MC Decision and Order at 8. In *Jones*, the Board affirmed an administrative law judge's weighing of evidence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), (2) separately from the evidence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Jones*, 21 BLR at 1-106. Contrary to the administrative law judge's analysis, the Board did not hold in *Jones* that an administrative law judge may weigh only one type of evidence to determine if clinical or legal pneumoconiosis is established. *Id*. The Board recognized only that the administrative law judge may conduct a separate analysis of all the relevant evidence for each disease, and render separate findings. *Id*.

[12] Dr. Swedarsky opined that the miner's slides showed "only one or two pigment macules and . . . no coal nodules." Employer's Exhibit 10. He concluded that the autopsy findings were insufficient to justify a diagnosis of coal workers' pneumoconiosis. *Id*. He also opined that the miner did not have legal pneumoconiosis, explaining that coal dust exposure was not a contributing factor in the miner's idiopathic pulmonary fibrosis. *Id*.

We also agree with employer that the administrative law judge did not give proper consideration to the opinions of Drs. Fino and Pickerill. Employer may rebut the Section 411(c)(4) presumption by establishing that the miner did not have either legal or clinical pneumoconiosis arising out of coal mine employment. *Bender*, 782 F.3d at 137. The administrative law judge found that claimant was entitled to the presumption at 20 C.F.R. §718.203 that the miner's pneumoconiosis arose out of coal mine employment because the miner had at least ten years of coal mine employment. MC Decision and Order at 11. The administrative law judge erroneously stated, however, that "[e]mployer has not presented any evidence indicating that something other than coal mine employment may have caused [c]laimant's pneumoconiosis." *Id*.

Specifically, Dr. Fino classified a January 28, 2013 x-ray as positive for pneumoconiosis, 2/2, t/s in four lower lung zones but he explained in his medical report that, while the miner had radiographic evidence of "a pneumoconiosis," it was not "*coal worker's* pneumoconiosis."[13] Director's Exhibit 15 (emphasis added). Dr. Pickerill also opined that claimant does not have coal workers' pneumoconiosis, explaining that the radiographic evidence was typical for interstitial pulmonary fibrosis, with irregular opacities in the lower lung zones, and not consistent with a coal-dust related disease. Director's Exhibit 16. Because the administrative law judge did not discuss relevant evidence on the issue of disease causation, we instruct the administrative law judge to reconsider the opinions of Drs. Fino and Pickerill and determine whether employer is able to rebut the presumption by establishing that the miner's clinical pneumoconiosis did not arise out of his coal mine employment. *See* 20 C.F.R. §718.305(d)(1)(i); 20 C.F.R. §718.203; *Minich*, 25 BLR at 1-155.

Additionally, as the administrative law judge's finding that the miner had clinical pneumoconiosis affected the weight he gave the opinions of Drs. Fino and Pickerill on the issue of disability causation, we vacate the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Accordingly, we vacate the award of benefits in the miner's claim.

[13] Dr. Fino stated that "the presence of only irregular opacities, in the absence of rounded opacities that are found only in the lower lung zones do[es] not indicate a coal dust related lung condition." Director's Exhibit 15.

II. Survivor's Claim

The administrative law judge found that because the miner was awarded benefits on his claim, claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 2. Because we have vacated the award of benefits in the miner's claim, we also vacate the administrative law judge's finding pursuant to Section 932(*l*).

III. Remand Instructions

On remand, the administrative law judge must consider and weigh all relevant evidence to determine whether it is sufficient for employer to establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of both legal and clinical pneumoconiosis, or by establishing that no part of the miner's pulmonary or respiratory disability was caused by pneumoconiosis, as outlined in 20 C.F.R. §718.305(d). *Minich*, 25 BLR at 1-159. As the administrative law judge previously weighed only the x-ray evidence, the administrative law judge must weigh all evidence relevant to whether employer has disproved that the miner had clinical pneumoconiosis and whether the clinical pneumoconiosis arose out of coal mine employment. The administrative law judge should also render a finding as to whether employer has disproved the existence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2).[14] *Id*. Determinations regarding the existence of both clinical pneumoconiosis, arising out of coal mine employment, and legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), (B), are necessary to provide a framework for the analysis of the credibility of the medical opinions on the issue of disability causation at 20 C.F.R. §718.305(d)(1)(ii). *Id*.

If employer proves that the miner did not have legal and clinical pneumoconiosis arising out of coal mine employment, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and he does not have to reach the second rebuttal prong. However, if employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part of the miner's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis. *Minich*, 25 BLR at 1-159.

[14] With regard to the issue of whether the miner had legal pneumoconiosis, the existence and cause of the disease are subsumed in one analysis. Thus, if employer disproves legal pneumoconiosis, it will necessarily disprove coal mine employment as the cause of the disease. 20 C.F.R. §718.201.

If employer fails to establish rebuttal of the Section 411(c)(4) presumption under either prong, the administrative law judge may reinstate the awards of benefits in the miner's claim and in the survivor's claim. If benefits are denied on the miner's claim, claimant is not entitled to benefits under Section 932(*l*), and she must instead establish her entitlement pursuant to 20 C.F.R. §718.205(c). In rendering his decisions and orders on remand, the administrative law judge must set forth the rationale underlying his findings of fact and conclusions of law as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part, and vacate in part, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim. Moreover, we vacate the Decision and Order Awarding Benefits in the survivor's claim. This case is remanded for further consideration of both claims consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge